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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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JUN - 5 2006

Federal Communications Commission  
Office of Secretary

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In the Matter of )  
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ARKANSAS CABLE )  
TELECOMMUNICATIONS )  
ASSOCIATION; COMCAST OF )  
ARKANSAS, INC.; BUFORD )  
COMMUNICATIONS I, L.P. d/b/a )  
ALLIANCE COMMUNICATIONS )  
NETWORK; WEHCO VIDEO, INC.; and )  
TCA CABLE PARTNERS d/b/a COX )  
COMMUNICATIONS, )  
 )  
 )  
Complainants, )  
 )  
 )  
v. )  
 )  
 )  
ENTERGY ARKANSAS, INC., )  
 )  
 )  
Respondent. )  
\_\_\_\_\_

EB Docket No. 06-53

EB-05-MD-004

To: Office of the Secretary  
Attention: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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June 5, 2006

## SUMMARY

*Complainants oppose Entergy's Application for Review. Entergy's* Application fails to meet the clear, unambiguous requirements for requesting review of a Hearing Designation Order ("HDO"). Entergy failed either to request certification from the ALJ or to wait until after the ALJ issues an initial decision, as required by 47 C.F.R. § 1.115. Further, Entergy's Application exceeds the Commission's 5-page limitation.

Entergy's attempt to separate the jurisdictional issues for review violate clear Commission precedent against such piecemeal review. In addition, Entergy's Application makes clear that the jurisdictional issues it is challenging are not separate and distinct, but are intrinsically intertwined with substantive issues designated for hearing. Review of the HDO's jurisdictional findings will necessarily affect and implicate the other issues in the Order.

The procedural deficiencies aside, Entergy's Application should also be denied. It does not establish that any of the Bureau's findings in the HDO exceed the scope of the Commission's jurisdiction. To the contrary, all of the Bureau's findings are grounded in long-standing Commission precedent addressing the same substantive issues and supported by the record evidence.

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*are ripe for review now with the core issues designated for hearing that are not.*  
Entergy's attack must therefore fail.

Procedurally, Entergy's Application is deficient. Despite the rules for reviewing hearing designation orders clearly set forth at 47 C.F.R. § 1.115(e), Entergy has chosen instead to follow the procedures set forth at Section 1.115(a). In so doing, Entergy purposefully avoided the deadline for requesting certification from the ALJ and has exceeded the 5-page briefing limitation. This approach is wholly inconsistent with long-standing Commission precedent that forbids parties from proceeding along a course other than the one established in Section 1.115(e).

Entergy's Application is equally deficient in substance. It simply cannot reconcile its arguments that the Commission has no jurisdiction to hear these cases with the Commission's long history of doing so. Far from overstepping its broad but clear jurisdictional limits as Entergy argues, the HDO fits squarely within the Commission's core regulatory mission of determining whether the terms and conditions that Entergy has placed on Arkansas cable operators are just and reasonable. None of the purported bases of Entergy's Application has merit and, accordingly, the application should be denied.

## **II. ENTERGY'S APPLICATION FOR REVIEW IS PROCEDURALLY DEFECTIVE**

EAI's Application challenging the Bureau's HDO – totaling seventeen pages and coming more than two months after the HDO's March 2, 2006 release date – is an abuse of the Commission's procedural rules. It is a transparent effort to obtain Commission review outside the normal course and, as such, suffers a host of

procedural defects. It is either too early or too late; unquestionably too long; and, in the present procedural posture, is simply directed to the wrong authority.

Accordingly, the Commission should deny Entergy's Application. <sup>1/</sup>

**A. Entergy Has Not Complied With The Rules For Review And, As A Result, Cannot Seek Interlocutory Review**

The Commission's rule governing applications for review of a hearing designation order is straightforward and unambiguous. It provides that "applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case is filed, *unless* the presiding Administrative law Judge certifies such an application for review to the Commission." 47 C.F.R. § 1.115(e)(3) (emphasis added). There are no exceptions.

Entergy's Application seeks review of "a hearing designation order issued under delegated authority," but does not meet the requirements of Rule 1.115(e)(3). First, Entergy has not "deferred" its Application until the initial decision – there has been no hearing yet, let alone an initial decision. Second, Judge Steinberg has not certified the Application for Review. *See id.* In fact, EAI never sought such certification, let alone within the required five days of release of the HDO. *See id.* ("A request to certify a matter to the Commission shall be filed

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<sup>1/</sup> Entergy neither seeks nor provides any plausible justification for a waiver of the applicable Commission rules. *See, e.g., In the matter of Teletech Inc. Petition to Decertify IAFC, IMSA & SEFCC as Frequency Coordinators in the Fire & Special Emergency Radio Servs.*, 5 FCC Rcd. 2887 (1990) (holding that "Teletech . . . has provided insufficient grounds to waive Section 1.115(d), and, therefore, we are dismissing the instant application as procedurally defective").

with the Presiding Administrative Law Judge within 5 days after the designation order is released.”).

Because Entergy meets neither condition precedent for filing its Application, the Commission, by its own rules, cannot entertain it now. Having missed the 5-day deadline for requesting certification, and having not yet received an initial decision, Entergy’s Application is in administrative purgatory. It is either too early or too late for consideration.

Entergy’s Application is also far too long. Section 1.115 provides that “[a]pplications for review of interlocutory actions in hearing proceedings (*including designation orders*) and oppositions thereto shall not exceed 5 double-spaced typewritten pages.” 47 C.F.R. § 1.115(f) (emphases added). Ignoring this rule, Entergy’s Application totals 17 pages. *See* EAI Application for Review at 17. Even though Entergy is aware of these Commission rules, *see* Application at 2, it does not offer any justification for deviating from them. *See* note 1, *supra*. Instead it asserts dubious “concern[s]” about the proper timing of review of the HDO (*see* Application for Review at 2) and other rules that have no applicability in this context. *See* Section II.C., *infra* at 7.

This is hard to believe. On its face, Rule 1.115(e)(3) unambiguously sets forth the appropriate procedure.

Entergy’s only real concern is that it has missed its deadline for requesting certification. It could have allayed any *bona fide* concerns about its right to appeal by seeking ALJ certification *at the proper time*. Clearly it had time to act

since it filed its Petition for Clarification within the 5-day window (though it directed it to the Bureau, not the ALJ).

Its attempt to circumvent the Commission rules instead is motivated by its fear that it could not meet the high standard for certification. *See* 47 C.F.R. § 1.115(e)(3) (“a matter shall be certified only if the presiding [ALJ] determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion”). If the Judge decided not to certify, Entergy would have no recourse until the Judge renders an initial decision. *See id.* § 1.115(e)(3) (“A ruling refusing to certify a matter to the Commission is not appealable”); *In re Application of Rancocas Valley Broadcasting Co., Inc.*, 95 F.C.C. 2d 429, n.1 (1983) (“Our recent revision of Section 1.115 . . . eliminates direct review of hearing designation orders issued under delegated authority *absent certification* of the presiding Administrative Law Judge.” (emphases added)).

What this means is that Entergy would have to wait until the end of the hearing to bring the matter to the Commission’s attention. Impatient and unwilling to play by the rules, Entergy has hurdled the Judge to get its review in front of the Commission. It is strategy (albeit ill-conceived and -executed) not any “concern[ ],” *see* Application at 2, driving Entergy’s attempt to elude the ALJ and its Commission-appointed gate-keeping function, *see* 47 C.F.R. § 1.115(e)(3), which is to prevent the filing of interlocutory Applications that cannot meet the high standard.

Entergy did, however, file a Motion to Enlarge, Change and Delete Issues directly with Judge Steinberg on May 4, 2006. Entergy’s Motion seeks

effectively the same relief that Entergy seeks in its Application, but in the form of a “modification” to the HDO rather than a certification of a question of law. As a result, essentially the same issues are currently pending before two different authorities, adding to the procedural morass Entergy has created with the present filing.

**B. Entergy’s Petition For Clarification Has No Affect On Entergy’s Application For Review**

Entergy should not be entitled to rely on the Petition for Clarification it filed with the Bureau on March 9, 2006, to justify its failure to submit *Judge Steinberg* a timely request for certification. Far from demonstrating its “prudence,” *see* Application at 4, it further evidences the lengths to which Entergy is willing to go to seek review outside the normal course established in the Commission’s rules. Entergy nowhere explained how its “Petition for Clarification” directed to an interested party (as the Bureau already was by then) could possibly dispel “the uncertainty regarding the appropriate provision (and deadline) for filing an application for review of [the Bureau’s] determination.” Application at 3. It cannot.

The rules make clear that it should have directed that query to Judge Steinberg as a certification request. *See* 47 C.F.R. § 1.115(e). Section 1.115 plainly states that “no application for review will be granted *if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.*” 47 C.F.R. §1.115(c) (emphasis added). The ALJ – not the Bureau – is the designated authority presiding over the HDO and he has yet to pass on any of the issues raised in the Application for Review. Even if the Bureau had responded to

the Petition, it would not have done so under any color of adjudicatory authority, as it had already discharged that role to Judge Steinberg.

Thus, if “prudence,” rather than strategy were Entergy’s purpose, it would have simply followed the rules and requested certification. But it chose not to and, therefore, the Commission should make it wait until after the ALJ issues his initial decision for its next bite at the Application for Review apple.

**C. Entergy Cannot File An Application For Review Under Section 1.115(a).**

EAI’s contention that the HDO nevertheless contains final rulings that are presently appealable pursuant to Section 1.115(a) is also incorrect and the Commission should reject it.

First, this theory conflicts with multiple familiar canons of construction used for interpreting written rules, regardless of whether they are statutes or regulations. As the Commission has explained, “ ‘[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ ”<sup>2/</sup> By the same token, the

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<sup>2/</sup> *In re Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 17 FCC Rcd. 1960, 1970 (2002) (citing & quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); see also *Amer. Fed’n of Labor & Congress of Industrial Org. & DNC v. Fed. Election Comm’n*, 177 F. Supp. 2d 48, 58 (D.D.C. 2001) (“Where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.”) (quoting & citing 2A Sutherland, *Statutory Construction* §46.5 (6<sup>th</sup> ed. 2005)); *Leisnoi v. Stratman*, 154 F. 3d 1062, 1067 (9<sup>th</sup> Cir. 1998) (had Congress intended term used in one subsection of a statute to have general application, it would have used that term throughout the statute).

Commission has also explained that “ ‘it is a commonplace of statutory construction that the specific governs the general.’ ”<sup>3/</sup> This canon, the Commission has observed, stands as a “ ‘warning against applying a general provision when doing so would undermine limitations created by a more specific provision.’ ”<sup>4/</sup>

Sections 1.115(e)(3) and 1.115(f) provide for and govern applications for review of HDOs, <sup>5/</sup> while the Section upon which Entergy relies – Section 1.115(a) – makes no mention of HDOs. This omission, under the familiar canons of construction noted above, is instructive: had the Commission intended parties to

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<sup>3/</sup> *In re Applications of Ameritech & SBC Communications, Inc.*, Memorandum Opinion & Order, 14 FCC Rcd. 14,712, 14,940, ¶ 553 (citing & quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)), *vacated in part by Association of Communications Enterprises v. FCC*, 235 F.3d 662, (D.C. Cir. 2001) and subsequently modified by *In the Matter of Ameritech Corp.*, 16 FCC Rcd. 5714 (2001); see also, e.g., *In the Matter of Implementation of Section 210 of the Satellite Home View Extension & Reauthorization Act of 2004 To Amend Section 338 of the Communications Act*, Report & Order, FCC 05-159, 2005 WL 2035645, at \*6, ¶ 16 & n.66 (2005) (“Under principles of statutory construction, section 338(a)(4)’s specific mandate requiring carriage of ‘the signals originating as digital signals’ in Alaska and Hawaii supersedes the general comparability directive set forth in § 338(j).”)

<sup>4/</sup> *In re Applications of Ameritech & SBC Communications, Inc.*, Memorandum Opinion & Order, 14 FCC Rcd. 14,712, 14,940, ¶ 553 (citing & quoting *Varity Corp. v. Charles Howe*, 516 U.S. 489, 511 (1996)), *vacated in part by Association of Communications Enterprises v. FCC*, 235 F.3d 662, (D.C. Cir. 2001) and subsequently modified by *In the Matter of Ameritech Corp.*, 16 FCC Rcd. 5714 (2001).

<sup>5/</sup> *In re Applications of EZ Communications, Inc. for Renewal of License for Station Wbzz (FM) Pittsburgh, Pennsylvania*, 8 FCC Rcd. 8435 (1993) (party who unsuccessfully attempted to designate certain issues for hearing in HDO was precluded from appealing the decision under 1.115(a) before the proceedings concluded); *In re Applications of Pike Family Broadcasting, Inc.*, 6 FCC Rcd. 5552, fn. 2 (1991) (parties challenging any aspect of an HDO are limited to the relief stated in Section 1.115(e)(3)).

seek review of an HDO under Section 1.115(a), in addition to Section 1.115(c), it would have so provided. But it did not.

Further, Entergy's effort to find in the HDO a reviewable "final determination" by slicing and dicing its text is an approach the Commission has already rejected. In *Applications of Algreg Cellular Engineering, et. al.*, the Commission ruled that an HDO should not be appealed in "piecemeal" fashion because such an approach "would clearly undermine the rationale behind the rule against interlocutory appeals of designation orders." 12 FCC Rcd. 8148, 8157, ¶21 (1997). The same rational has equal force here. Entergy seeks to challenge only certain aspects of the HDO while conceding that the remaining portions are not currently ripe for review. There is no better example of a piecemeal attack on an HDO.

Finally, the Commission should reject Entergy's contention that the HDO's resolution of "threshold" issues is sufficiently "distinct" from the rest of the Order to deserve immediate review. See Application at 2-3. In making its case against the jurisdictional findings, Entergy objects to Issues 1(c) and 5(b). As a result, its jurisdictional challenge is intrinsically intertwined with its objections to these issues designated for hearing. Practically, this means that Entergy is asking the Commission to review *both* the jurisdictional issues as well as those designated for hearing. In other words, Entergy seeks review of the jurisdictional issues only in order to excise certain issues designated for hearing from the HDO.

It has taken the same position in seeking to convince the ALJ to “modify” the HDO. In a pleading submitted to Judge Steinberg on June 1, 2006, Entergy argues that its Application addresses jurisdictional issues and specifically “focused on Issues 1(c) and 5(b).” *Reply to Complainants’ Response to Entergy’s Reply In Support Of Its Motion To Enlarge, Change and Delete Issues In The Hearing Designation Order* at 6, attached hereto as Exhibit 1.

The Commission cannot overlook the significance of Entergy’s argument. While Entergy justifies its untimely Application on the theory that the “threshold” jurisdictional issues are severable from the rest of the HDO, it is clear from the faces of both its Application and its June 1 filing that it does not truly subscribe to that theory. By linking the jurisdictional questions to the propriety of setting Issues 1(c) and 5(b) for hearing, Entergy in fact recognizes that the HDO is not neatly divided into discrete sections but is in fact an integrated whole: the jurisdictional findings are intrinsically linked to the issues that the Bureau designated for hearing before an ALJ. The two cannot be dealt with in piecemeal.

### **III. THE HDO DOES NOT EXCEED COMMISSION JURISDICTION**

Procedural deficiencies aside, Entergy’s Application for Review is based on misinterpretation and misapplication of both the issues presented in the HDO and long-standing Commission precedent. The Application does not require the Commission to engage in any novel or ground-breaking analysis. To the contrary, the Commission can easily dispose of Entergy’s Application by applying well-established and often-relied-upon pole attachment law.

**A. The Pole Attachment Act Protects Attachers From Unjust And Unreasonable Terms And Conditions Of Attachment, Including Ones Characterized As Safety Or Engineering Standards.**

The purpose and intent of the pole attachment act is to prevent utility pole-owner abuse of monopoly-controlled essential facilities. These abuses include “exorbitant rental fees and other unfair terms.” 6/ Congress’ predominant legislative goal is “to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public.” 7 / The Telecommunications Act of 1996 (“1996 Act”) expanded the FCC’s jurisdiction over poles and conduit to cover telecommunications, in addition to cable attachments, so that providers of telecommunications services as well as cable operators would be entitled to “nondiscriminatory access” to utility poles and conduit at “just and reasonable” rates terms and conditions. 8/

The Pole Attachment Act – as designed by Congress and implemented by the Commission – creates a mechanism whereby attachers can seek relief from unjust, unreasonable and discriminatory terms regardless of whether they are dressed up as “contract terms” or “engineering standards.” *See* 47 C.F.R. § 1.1401 *et*

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6/ *Amendment of Rules & Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, ¶ 21 (2001) (hereinafter “2001 Pole Order”), *aff’d Southern Company Services, Inc. v. FCC*, 313 F.3d 574,582 (D.C. Cir. 2002).

7/ *Id.*

8/ 47 U.S.C. § 224 (a)(1)(4).

seq. Any time a utility conditions either initial or continued access to the poles on compliance with any term or condition alleged to be unjust or unreasonable, the Commission has the authority to hear a Complaint, so long as it otherwise complies with the Commission's complaint rules. *See Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 3 (Com. Car. Bur. 1992) (challenging the reasonableness of the safety standards applied).

Nothing in the statute, regulations or legislative history indicates that safety standards should be categorically excluded from the terms and conditions over which the Commission has jurisdiction. In fact, pole attachment complaints and rulemakings often involve issues relating to safety, including applicable provisions of the National Electrical Safety Code (NESC) and other generally applicable engineering standards. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 1143-1158 (1996) ("*Local Competition Order*"), *aff'd sub nom Southern Co. v. FCC*, 293 F.3d 1338 (11<sup>th</sup> Cir. 2002); *see Newport News*, 7 FCC Rcd. 2610, ¶ 3; *Cable Television Ass'n of Ga. v. Georgia Power Co.*, 18 FCC Rcd. 16,333, ¶ 10-12 (Enf. Bur. 2003); *Cable Texas, Inc. v. Entergy Serv., Inc.*, 14 FCC Rcd. 6647 (Cab. Serv. Bur. 1999).

Furthermore, Congress specifically charged the Commission with ensuring that access denials are reasonable, based on insufficient capacity or "*reasons of safety, reliability and generally applicable engineering standards.*" 47 U.S.C. § 224(f)(2) (emphasis added). A necessary part of this delegation of authority

is for the Commission to interpret and enforce Section 224(f)(2). If Congress did not consider the Commission knowledgeable to address “reasons of safety, reliability and generally applicable engineering standards,” it would have undoubtedly assigned that responsibility to another agency. It did not; instead it expressly entrusted authority to *this* agency.

In exercising its delegated authority, the Commission has consistently refused to defer to utility practices simply because safety or engineering standards are at issue. A “utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards . . . [but] the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable.” *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11,599, ¶ 11 (Cab. Serv. Bur. 1999) (citing *Local Competition Order* at ¶ 1158). Similarly, “[w]here a local [safety] requirement conflicts with a rule or guideline [of the Commission’s, the Commission’s] rules will prevail.” *Local Competition Order*, ¶ 1154.

What this means is that Entergy cannot merely invoke safety or engineering standards as a shibboleth to ward off Commission jurisdiction. This makes sense. Otherwise, pole owners would have *carte blanche* to engage in unreasonable conduct so long as they did so in the name of “safety.” *See also* HDO ¶ 12. The Commission has never interpreted its delegation of authority this way and Entergy points to no evidence that Congress intended it to do so. The statute’s plain text strongly signals otherwise and that should guide the Commission.

**B. The HDO Is Consistent With The Commission's Preference For Case-By-Case Analysis.**

Entergy and Complainants are in agreement on at least one issue. The Commission is not in the business of creating specific safety and engineering standards. Nor should it be.

However, Congress put the Commission in the business of determining whether safety and engineering standards are imposed and applied to attachers in a just, reasonable and non-discriminatory way. *See* 47 U.S.C. § 224. That is what Complainants have asked the Commission to do and that is what the HDO charges the ALJ to do.

Entergy's histrionics about the Commission "setting or determining" standards are just that—histrionics. Complainants have not requested that the FCC come up with applicable engineering standards or apply or enforce them in the field. <sup>9/</sup> The question Complainants ask and have briefed is whether Entergy's imposition and application of certain specific standards are unjust, unreasonable, or discriminatory based on the facts of this case. The Commission has fielded these same questions time and again. *See Local Competition Order* at ¶¶ 1143-1158; *Newport News*, 7 FCC Rcd. 2610, ¶ 3; *Cable Television Ass'n of Ga. v. Georgia Power Co.*, 18 FCC Rcd. 16,333, ¶ 10-12 (Enf. Bur. 2003). Entergy has already been a party to at least one such case. *See Cable Texas, Inc. v. Entergy Servs., Inc.*, 14 FCC Rcd. 6647 (Cab. Servs. Bur. 1999).

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<sup>9/</sup> Ironically, this is what Entergy requests. In its Response, ¶ 29, p. 18, EAI asks the Commission to exercise its authority to "require[ ] the Cable Operators to remedy [their alleged] safety violations. . . ."

What the HDO asks the ALJ to consider is whether, as a factual matter, EAI has asked for heightened standards and, as a legal matter, whether that is unjust and unreasonable under these particular circumstances. The Judge is not tasked with coming up with the standards he thinks should apply. Rather, he is tasked with determining whether Entergy's imposition and application of the challenged standards are just, reasonable and non-discriminatory, and consistent with Section 224. Although Entergy attempts to blur the line between them, they are very different analyses.

Entergy also confuses the Commission's reticence to set generally applicable standards with a lack of jurisdiction. See Application at 11, 13-14. In the *Local Competition Order*, the Commission decided against setting rules for safety and engineering standards. See ¶¶ 1143-1158. But the Commission was clear. It did not disclaim its right to review standards under the just and reasonable standard. Instead, it explained that it preferred to address problems as they arise on a case-by-case basis. *Id.* That is exactly what the Bureau, acting under the Commission's delegated authority, has asked the ALJ to do here. Neither is the Commission attempting to exercise its regulatory authority over electric utility operations. Entergy confuses the Commission's examination of Entergy's own safety and engineering practices with regulation of electric plant. Again, these are two very different things.

The Commission is not being asked to decide how Entergy should or should not maintain its plant. Rather, it is charged with examining Entergy's

treatment of its own facilities so that it may then determine whether Entergy's treatment of Complainants' facilities is just, reasonable or discriminatory. For example, if Entergy does not enforce its standards on its own facilities when it is responsible for the bill, it is unreasonable to enforce the standards when Complainants are responsible. Ultimately, where there is evidence of selective enforcement of heightened or other engineering standards, the Commission has the authority to determine whether such enforcement is just and reasonable and/or discriminatory.

**C. The Issues Designated For Hearing Are Supported By The Record And Are Consistent With Commission Precedent**

Entergy's final argument in its Application is that the record does not support the Bureau's jurisdictional findings. See Application at 14. Or at least that is what the heading to the final section argues. A closer examination reveals that Entergy does not really address sufficiency of the record. Instead it engages in a somewhat confusing rehash of its earlier discussion of why it believes that the Complaint and the HDO reach beyond the scope of the Commission's jurisdiction.

Entergy starts out arguing that "the Complaint seeks relief well beyond the scope of the relief characterized in the HDO." Application at 14. Whether the HDO narrowed the scope of Complainants' relief is not at issue. To the extent it has, Complainants do not object.

As to Entergy's remaining arguments, they simply reiterate what it says elsewhere: that the FCC does not have jurisdiction to pass judgment on the

state of Entergy's electric facilities and/or their engineering standards.

Complainants address these arguments at Section III.A. and B., above.

Although it purports to be the focus of its final argument, Entergy never really develops its contention that the record does not support the HDO. Even if it had, it would be wrong. In its Complaint, Reply and accompanying affidavits and exhibits, Complainants present voluminous evidence, including testimony and photographs showing that Entergy installs its facilities in violation; that it is willing to overlook these violations where it is responsible for the costs; that it demands Complainants to correct these dangerous conditions at their expense; that it has not applied its safety and engineering standards to itself or other attachers consistently. *See* Complaint; Reply; Joint Statement. It is hard to imagine what further evidence could be required to justify the Bureau's decision to set issues related to Entergy's plant and practices for hearing.

And, as explained above, the Bureau's decision to set these issues for hearing is supported by long-standing Commission precedent. *See, e.g., Cavalier*, 15 FCC Rcd. 9563, ¶ 16 (attachers cannot be responsible for clearing violations created by others, including the pole owner); *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24,615, ¶ 40 (2003) (same).

What this Application for Review is really about is Entergy's attempt to duck its own responsibility for poor plant conditions. Its strategy throughout the parties dispute has been to be deaf, dumb and blind to its own culpability in creating violations. This Application is just an extension of that strategy.

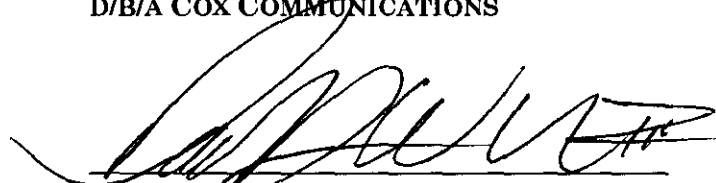
However, its culpability is highly relevant to this case. Now that the Bureau has designated these issues for hearing, a full and fair review under Section 224 requires the Commission to examine Entergy's electric construction, engineering and safety practices to determine whether the standards and requirements it imposes on Complainants are just, reasonable and non-discriminatory. That examination will show that Entergy imposes two different standards of safety and construction with respect to its own facilities depending on whether responsibility for the condition is allocated to itself or to Complainants. The scope of the examination therefore properly includes an analysis of Entergy's own electric utility safety practices.

#### IV. CONCLUSION

For the foregoing reasons, Entergy's Application for Review should be either dismissed or denied.

Respectfully Submitted,

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June 5, 2006

Its Attorneys

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

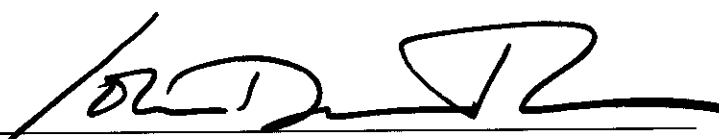
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	)	
ARKANSAS CABLE	)	
TELECOMMUNICATIONS	)	EB Docket No. 06-53
ASSOCIATION; COMCAST OF	)	
ARKANSAS, INC.; BUFORD	)	
COMMUNICATIONS I, L.P. d/b/a	)	
ALLIANCE COMMUNICATIONS	)	EB-05-MD-004
NETWORK; WEHCO VIDEO, INC.; and	)	
TCA CABLE PARTNERS d/b/a COX	)	
COMMUNICATIONS,	)	
	)	
<i>Complainants,</i>	)	
	)	
v.	)	
	)	
ENTERGY ARKANSAS, INC.,	)	
	)	
<i>Respondent.</i>	)	
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**DECLARATION AND AFFIDAVIT OF JOHN DAVIDSON THOMAS**

I, John Davidson Thomas, hereby declare under the penalty of perjury of the laws of the United States:

1. I was responsible for and oversaw the preparation of the above captioned Opposition to Application for Review ("Opposition"). I verify that the facts contained in the Opposition are true and accurate to the best of my knowledge, information and belief.

2. I declare, under the penalty of perjury of the laws of the United States, that the foregoing is true and correct.

 dated: 6/5/06  
John Davidson Thomas